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No. _____ OFFICE OF THE CLERK

In The
Supreme Court of the United States

KIMBERLY F. GODON,

Petitioner,

v.

**NORTH CAROLINA CRIME CONTROL & PUBLIC SAFETY;
NORTH CAROLINA TARHEEL CHALLENGE ACADEMY;
KENNETH STALLS, in his individual and official capacities;
DALE AUTRY, in his individual and official capacities;
LESLIE T. EVERETT, in his individual and official capacities;
STATE OF NORTH CAROLINA,**

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

Whether the relief which the free speech Petitioner is seeking — reinstatement to her former position of employment — is prospective within the meaning of the doctrine of *Ex parte Young* and, therefore, is not barred by the Eleventh Amendment of the United States Constitution?

Whether a plaintiff who defeats a defendant's motions pursuant Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure is entitled to a trial ?

PARTIES TO THE PROCEEDING

Petitioner is Kimberly F. Godon.

Respondents are North Carolina Crime Control & Public Safety; North Carolina Tarheel Challenge Academy; Kenneth Stalls, in his individual and official capacities; Dale Autry, in his individual and official capacities; Leslie T. Everett, in his individual and official capacities; and the State of North Carolina.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Fourth Circuit's Rule 56 Opinion is unreported (App. 1). The District Court's Rule 56 Order is unreported (App. 6). The Fourth Circuit's Rule 12(b)(6) Opinion is unreported (App. 17). The District Court's Rule 12(b)(6) Order is reported at 959 F.Supp. 284 (E.D.N.C. 1997) (App. 25).

STATEMENT OF JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on November 30, 2000. The Court of Appeals entered an order denying a timely petition for rehearing and petition for rehearing en banc on December 29, 2000 (App. 37).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

The First Amendment states in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the government for a redress of grievance.

The Fourteenth Amendment states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Rule 12(b)(6) of the Federal Rules of Civil Procedure states in pertinent part:

> Every defense in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required , except that the following defenses may at the option of the plead be made by motion: (6) failure to state a claim upon which relief can be granted.

Rule 56(d) of the Federal Rules of Civil Procedure states in pertinent part:

> If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleading and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

STATEMENT OF THE CASE

Petitioner Kimberly F. Godon ("Petitioner Godon") was formerly an employee of Respondent North Carolina Crime Control & Public Safety, North Carolina Tarheel Challenge Academy, and the State of North Carolina ("the Academy"). The Academy, a division of the North Carolina Department of Crime Control and Public Safety, provides education and other training to persons who have not completed their high school education for the purpose of enabling them to receive a high school equivalent diploma ("GED") in what may be euphemistically referred to as a "boot camp" environment. Petitioner Godon was discharged from employment after she complained directly to two (2) of her supervisors, Respondents Stalls and Autry, about the Academy's race and sex discriminatory discipline of its black and female students.

Petitioner Godon was terminated from her employment on May 17, 1995. Petitioner filed the instant case on September 16, 1996, asserting a claim for relief against Respondents pursuant to the First Amendment of the U.S. Constitution and 42 U.S.C. § 1983 and 1985. Godon seeks, among other remedies, injunctive relief — reinstatement — against Respondents Everette, Stalls and Autry individually and in their official capacity. The District Court summarily dismissed the case on March 6, 1997. (App. 25). The Fourth Circuit reversed in part and remanded the case to the District Court. (App. 17). The District Court granted summary judgment against Petitioner on October 7, 1999. (App. 6). The Fourth Circuit again reversed the District Court in part and remanded the case to the District Court. (App. 1). Godon's petition for rehearing and suggestion for rehearing en banc were denied by the Fourth Circuit. (App. 37).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT, THE FOURTH CIRCUIT'S OWN PRIOR DECISIONS, AND DECISIONS OF OTHER FEDERAL COURTS OF APPEALS

This Court in *Ex parte Young*, 209 U.S. 123, 159-60 (1908), held that a plaintiff may obtain prospective injunctive relief from a State defendant. Prospective injunctive relief will be upheld for constitutional violations even if it involves the ordering of a state official to use state funds. *See Papasan v. Allain*, 478 U.S. 265 (1986); *Edelman v. Jordan*, 415 U.S. 651 (1974); and *Milliken v. Bradley*, 433 U.S. 267 (1977).

Godon seeks prospective injunctive relief: reinstatement to her former position. The Court of Appeals for the Fourth Circuit concluded that reinstatement is not prospective, holding that Eleventh Amendment bars Godon's claim for reinstatement. (App. 5). The Fourth Circuit's holding is a departure from its own prior holdings. To "the extent [the employee] sought injunctive (e.g. reinstatement) against Sheriff Brown in his official capacity, the district court should not have granted summary judgment to Sheriff Brown." *Cromer v. Brown*, 88 F.3d 1315, 1332 (4th Cir. 1996). *See Coakley v. Welsh*, 877 F.2d 304, 307, n. 2 (4th Cir. 1989)(plaintiff sought prospective relief where he has alleged that Defendant's conduct "continues to harm him by preventing him from obtaining the benefits of . . . employment."); *Paraguay v. Allen*, 134 F.3d 622, 628 (4th Cir. 1998)("*Coakley* held that a state employee unconstitutionally discharged from his employment suffers a 'continuing violation' of that property right that could be remedied by a federal injunctive decree requiring his

reinstatement"); *Paxman v. Campbell*, 612 F.2d 848, 861 (4th Cir. 1980).

The holding of the Fourth Circuit is variant from many other Federal Courts of Appeals, which have held that reinstatement is prospective relief within the meaning of *Ex parte Young* and is not barred by the Eleventh Amendment. *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 705 (1st Cir. 1993); *Dwyer v. Regan*, 777 F.2d 825, 836 (2d Cir. 1985); *Warnock v. Pecos County, Texas*, 88 F.3d 341, 343 (5th Cir. 1996); *Turker v. Ohio Dept. of Rehab. & Corrections*, 157 F.3d 453, 459 (6th Cir. 1998); *Williams v. Kentucky*, 24 F.3d 1526, 1544 (6th Cir. 1994); *Kashani v. Purdue Univ.*, 813 F.2d 843, 848 (7th Cir. 1987); *Elliot v. Hinds*, 786 F.2d 298, 302 (7th Cir. 1986); *Osteen v. Hensley*, 13 F.3d 221, 223 (7th Cir. 1993)(college student expulsion); *Grantham v.Trickey*, 21 F.3d 289, 295, n. 4 (8th Cir. 1994); *Buchwald v. Univ. of New Mexico Sch. Of Medicine*, 159 F.3d 487, 495, n. 5 (10th Cir. 1998).

This Court apparently has never definitively addressed the issue of whether a discharged free speech employee's reinstatement is prospective relief, and, therefore, consonant with the Eleventh Amendment. However, in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978), this Court affirmed the lower court's order directing plaintiff's admission to medical school because the school could not establish that plaintiff would have been denied admission but for the unlawful special admissions program.

II. Petitioner, Having Defeated Respondents Motions To Dismiss And For Summary Judgment, Is Entitled To A Trial

Petitioner was terminated from her employment on May 17, 1995. Petitioner filed the instant case on September 16, 1996. Petitioner has now defeated Respondents' potentially dispositive motions for the second time.

Nevertheless, the Fourth Circuit remanded the case to the District Court, but stated that the District Court may allow further discovery and ultimately dismiss the case. (App. 5). Rule 56(d) of the Federal Rules of Civil Procedure provides:

> If on motion under this rule judgment is not rendered upon the whole case . . . and a trial is necessary, the court . . . **shall** thereupon make an order specifying the facts that appear without substantial controversy, including . . . directing such further proceedings in the action as are **just**. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(Emphasis added)

This case is now nearly five years in gestation. Having now twice defeated Respondent's motions to dismiss the case, a trial is the further "just" proceeding. The unpacking of the meaning of the term "just" within the context of Fed.R.Civ.P. 56(d) presents the Court with a matter of first impression.

CONCLUSION

This case presents questions of exceptional importance: (1) whether the Eleventh Amendment bars the reinstatement of a state employee who was discharged from employment for exercising her First Amendment to freedom of speech (2) whether the "just" proceeding following a Plaintiff's defeating a Defendant's Rules 12(b)(6) and 56 Motion is a trial. By granting Godon's petition, this Court can correct the decision of the Fourth Circuit, which is counter to this Court's longstanding holding that plaintiffs may obtain prospective injunctive relief from a State

defendant. In doing so, this Court will gird the First Amendment's right to freedom of speech.

Accordingly, Godon respectfully requests that her petition for a writ of certiorari be granted.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-2509

KIMBERLY F. GODON,

Plaintiff-Appellant,

v.

NORTH CAROLINA CRIME CONTROL & PUBLIC SAFETY; NORTH CAROLINA TARHEEL CHALLENGE ACADEMY; KENNETH STALLS, in his individual and official capacities; DALE AUTRY, in his individual and official capacities; LESLIE T. EVERETT, in his individual and official capacities; STATE OF NORTH CAROLINA,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Terrence W. Boyle, Chief District Judge.
(CA-96-804-5-BO)

Argued: October 31, 2000
Decided: November 30, 2000
Entered: November 30, 2000

Before WILKINSON, Chief Judge, and NIEMEYER and MOTZ, Circuit Judges.

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

COUNSEL

ARGUED: David Garrett Schiller, Raleigh, North Carolina, for Appellant. Isaac T. Avery, III, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees. **ON BRIEF:** Marvin Schiller, Raleigh, North Carolina, for Appellant. Reuben F. Young, Assistant Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Kimberly Godon, a former contract employee of the North Carolina Tarheel Challenge Academy, a State operated "boot camp" for youths who have failed to complete high school, filed this action under 42 U.S.C. §§ 1983 & 1985 (for First Amendment violations), Title VII of the Civil Rights Act, and state law, challenging the Academy's termination of her employment contract. Godon alleges that she was fired after complaining about the Academy's discriminatory treatment of female and black cadets. The Academy categorically denies that allegation and, instead, asserts that Godon's dismissal followed a long line of infractions, culminating in her conduct in giving female cadets permission to sleep together in direct violation

of Academy rules and informing the cadets that she had been placed on probationary status by her supervisors.

The proceedings have been protracted, including an earlier review by this court of the district court's Rule 12(b)(6) dismissal. *See Godon v. North Carolina Crime Control & Pub. Safety*, No. 97-1458, 1998 WL 193109 (4th Cir. April 23, 1998) (unpublished). In that decision, we affirmed the district court's dismissal of Godon's Title VII claim and remanded the case for further proceedings on Godon's First Amendment claim brought under 42 U.S.C. § 1983.

On remand, the record was developed only in a limited manner through affidavits. The State officers filed affidavits denying that Godon approached them with concerns about discrimination and alleging that Godon was fired, instead, for poor job performance and her negative attitude, which set a bad example for the cadets. They also filed an affidavit denying that cadets identified by Godon as victims of discrimination were in fact victims of discrimination.

Godon filed affidavits alleging that the reasons given by the officers for her dismissal were false. The former executive secretary of the Academy stated that "Godon was among the very best Team Leaders," and alleged that another supervisor praised Godon's performance at the Academy. Godon also produced her own affidavit, reasserting her claim that she was fired merely because she complained to the defendants about the Academy's discriminatory practices and denying that she had a negative attitude. She averred that a State employee told her about conversations with the defendants, revealing "plan to turn the Academy into an all white male academy." She also averred that when she presented that information to the defendants, they told her "to shut up, put up with it, or get out." These defendants also allegedly told Godon that "they were running the show now and if it were an all white academy, there would not be as many problems."

The district court acknowledged some ambiguity about the role that Godon's allegations played in her termination. The court stated:

> Plaintiff was being disciplined during the months of April and May, and it is far from clear that her complaints predated these disciplinary measures, the first of which was received on April 3. It is not unlikely, given these dates, that Plaintiff first raised the issue of discriminatory dismissal once her own job performance was already at issue. Having students from her class dismissed may have reflected unfavorably on her job performance, and therefore, Plaintiff had a personal interest in finding other reasons for their dismissal. In that case, Plaintiff's real, private concern about her position at the Academy would belie her apparent concern about a matter of public interest. Furthermore, it is unclear whether Plaintiff raised the issue of discrimination on the occasions throughout April in which she approached her supervisors to complain about a student's dismissal. She does not say whether at those meetings she objected on grounds of discrimination, or whether she merely objected to being excluded from these decisions.

But the court granted the defendants' motion for summary judgment on immunity grounds and declined to exercise pendent jurisdiction over the state law claims. As to its dismissal of the State defendants and the individual defendants in their official capacity, the district court relied on the Eleventh Amendment. With respect to its dismissal of the claims against the individuals in their individual capacity

for money damages, the court relied on principles of qualified immunity. The court reasoned that because Godon's statements were not "clearly addressing a matter of public concern," her allegations did not state a claim under clearly established law, and qualified immunity therefore applied.

For the reasons given by the district court, we affirm its dismissal of the State defendants and the individual defendants in their official capacity. On the qualified immunity rulings, however, we conclude that factual questions persist, some of which the district court seems to have recognized. The current forecast of the evidence, when viewed in a light most favorable to Godon, tends to show that she was terminated because she spoke as a citizen on matters of public concern. *See Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 354-58 (4th Cir. 2000); *Cromer v. Brown*, 88 F.3d 1315, 1325-29 (4th Cir. 1996). Nevertheless, the scant record and the parties' discussion at oral argument raise significant doubts about the ultimate viability of Godon's claims, particularly with regard to her ability to prove: 1) that the context of her speech was such that she as in fact speaking on a matter of public concern; and 2) that her exercise of rights protected by the First Amendment was a but-for cause of her termination. Accordingly, in vacating the order of summary judgment, we do not intimate that the district court must foreclose further pretrial proceedings. Limited discovery on these narrow questions could permit the district court to resolve this case without holding a trial.

In sum, we affirm the district court's ruling dismissing the State defendants and the individual defendants in their official capacity, and we remand Godon's claims against the individual defendants in their personal capacity for further proceedings.

AFFIRMED IN PART,
VACATED IN PART, AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

KIMBERLY F. GODON,
Plaintiff,

v.

NORTH CAROLINA CRIME CONTROL & PUBLIC SAFETY; NORTH CAROLINA TARHEEL CHALLENGE ACADEMY; KENNETH STALLS (in his individual and official capacities); DALE AUTRY (in his individual and official capacities); and THE STATE OF NORTH CAROLINA,
Defendants.

ORDER

No. 5:96-CV-804-BO(1)

Entered October 7, 1999

This matter is before the Court on the Motion to Dismiss and for Summary Judgment, pursuant to Rules 12(b) and 56 of the Federal Rules of Civil Procedure, filed by Defendants North Carolina Department of Crime Control & Public Safety, North Carolina Tarheel Challenge Academy, and the State of North Carolina; and the Motion for Summary Judgment, pursuant to Rule 56, filed by Defendants Kenneth Stalls, Dale Autry, and Leslie Everett. The underlying action alleges that Defendants illegally discharged Plaintiff Kimberly Godon from employment in violation of her First Amendment right to freedom of speech. Plaintiff's Amended Complaint also alleges pendent state law claims for violation of free speech rights under the North Carolina Constitution, wrongful discharge, and breach of

contract. Upon consideration of the parties' arguments, Defendants' motions are **GRANTED**.

BACKGROUND

From August 26, 1994 to May 17, 1995, Plaintiff Kimberly Godon worked as a team leader at Defendant North Carolina Tarheel Challenge Academy (the "Academy"). The Academy, a division of Defendant North Carolina Department of Crime Control & Public Safety ("CC & PS"), provides education and training in a highly-disciplined boot camp environment to high school dropouts and expellees, known as "cadets." As a team leader, Plaintiff supervised the training of a group of cadets. Plaintiff, in turn, was supervised by the Commandant and the Assistant Commandant, Defendant Aurty, who reported to the Director, Defendant Everett, and Deputy Director, Defendant Stalls. See Everett Aff. ¶ 8, Ex. D.

Plaintiff alleges that during the month of April, 1995, several of the cadets under her charge were terminated from the program. Plaintiff approached Defendant Aurty privately in his office each time a termination without her knowledge occurred, and "expressed [her] disapproval with what they were doing." Plaintiff claims she was consequently summoned to two counseling sessions in Defendant Stalls' office, on April 3 and April 9, during which Defendants Autrey and Stalls reprimanded her for her "negative attitude." The first of these sessions constituted a "verbal counseling," while at the second session, Plaintiff received a "written counseling" and was placed on probation. During both sessions, Plaintiff objected that female and black cadets were being disproportionately terminated, while white male cadets were being allowed to remain after committing infractions severe enough for termination. During the course of these conversations, Defendants Autrey and Stalls allegedly responded to Plaintiff's accusations of race and sex discrimination that "if it were an all white male academy,

there would not be nearly as many problems" regarding discipline among the cadets. In addition, the Academy's funding would be assured if more of its cadets passed the GED equivalency exam. Since the average score of the white cadets admitted to the program was higher than that of blacks, Plaintiff alleges that terminating black cadets was seen as advantageous.

After consulting with Defendants Stalls and Autry, on May 17, 1995, Defendant Everett terminated Plaintiff's employment by a letter stating two grounds: that Plaintiff had admitted to allowing female cadets to sleep together in single beds against Academy policy, and that Plaintiff had informed her cadets of her probation, causing them to submit a petition to Defendant Autry urging the Academy to allow plaintiff to remain as their Team Leader. Plaintiff alleges that she never admitted having given female cadets such permission, and that she never urged her cadets to submit the petition, and furthermore that both grounds are a pretext for the real reason for her termination: her expressed disapproval of her supervisors' allegedly discriminatory practices.

Plaintiff filed this action on September 16, 1996, and alleged five causes of action: violation of her free speech rights protected by the First Amendment to the United States Constitution, violation of her free speech rights protected by the North Carolina Constitution, sex discrimination in violation of Title VII of the Civil Rights Act of 1964, wrongful discharge, and breach of contract. In a March 4, 1997 Order, this court dismissed all of the Plaintiff's federal claims for relief, declined to exercise jurisdiction over her state law claims, and dismissed the original complaint in its entirety.

On April 23, 1998, the United States Court of Appeals for the Fourth Circuit affirmed in part and reversed in part the Court's March 4, 1997 Order. The Fourth Circuit affirmed the Court's dismissal of the Title VII claim, but reversed the dismissal of the First Amendment claim by

holding that Plaintiff's initial complaint survives a Rule 12(b) motion to dismiss.

Upon remand, this Court, in a June 10, 1998 Order, retained jurisdiction over the First Amendment and pendent state law claims, and allowed Plaintiff to file an Amended Complaint. Upon the close of discovery, Defendants CC & PS, Academy, and the State of North Carolina filed a motion to dismiss or for summary judgment, and Defendants Stalls, Autry, and Everett filed a motion for summary judgment. Plaintiff responded, and each of the motions is now ripe for adjudication.

DISCUSSION

A motion for summary judgment cannot be granted unless there are no genuine issues of material fact for trial. *See* Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party must demonstrate the lack of a genuine issue of fact for trial, and if that burden is met, the party opposing the motion must "go beyond the pleadings" and come forward with evidence of a genuine factual dispute. *Celotex Corp.*, 477 U.S. at 324. The Court must view the facts and the inferences drawn from the facts in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). A moving party is entitled to summary judgment when the record, taken as a whole, could not lead a rational trier of fact to find for the non-movant. *See id.* at 587.

1. Plaintiff's Claims Against State Defendants

The Eleventh Amendment to the United States Constitution provides that "[t]he judicial power of the Unites States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects

of any Foreign States." The Eleventh Amendment also applies to suits in federal court against a state brought by that state's own citizens. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993). Although a state may waive its sovereign immunity, or Congress may abrogate such immunity under the Fourteenth Amendment, *see Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), neither has occurred in this case. Plaintiff's suits against the Academy and against North Carolina Crime Control & Public Safety are therefore dismissed.

2. Plaintiff's Claim Against Defendants Stalls, Autry, and Everett in their Official Capacities

Plaintiff seeks both reinstatement and back pay from Defendants in their capacity as state officials. "[W]hen the action is in essence one for the recovery of money from the state the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). Consequently, Defendants in this case may properly invoke sovereign immunity in Plaintiff's claim for back pay. Although under the doctrine of *Ex parte Young*, 209 U.S. 123, 159-60 (1908), prospective injunctive relief is available in a claim against state officers in their official capacities, the reinstatement Plaintiff seeks is not prospective, and thus Plaintiff's official capacity claim is barred by the Eleventh Amendment.

3. Plaintiff's Claims Against Defendants in Their Individual Capacities.

Defendants assert that they are protected from suit against them in their individual capacities by the defense of qualified immunity. Qualified immunity is a threshold

defense, and a preemptive bar to consideration of the merits of a cause of action when asserted in response to a colorable claim against government officials. Government officials performing discretionary functions, sued in their individual capacity, are protected by qualified immunity "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 637, 638 (1987). That is, they are shielded from civil liability to the extent that their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

In reviewing the claims of qualified immunity on a summary judgment motion, the Court must "answer two questions: (1) whether the constitutional right allegedly violated was clearly established, and (2) whether genuine issues of material fact exist regarding the officer's conduct." *Bonner v. Anderson*, 81 F.3d 472, 476 (4th Cir. 1996) (citing *Johnson v. Jones*, 515 U.S. 304 (1995)). *See also Robinson v. Balog*, 160 F.3d 183, 187 (4th Cir. 1998). In the instant case, Plaintiff contents that Defendants violated her First Amendment free speech rights. This court must therefore examine the facts in the light most favorable to Plaintiff, and determine whether a clearly established right was violated.

Plaintiff's claim for retaliatory discharge under the First Amendment has three elements. First, she must have been speaking "as a citizen upon matters of public concern" and not "as an employee upon matters only of personal interest." *Connick v. Myers*, 461 U.S. 138, 147 (1983). Second, her free speech interest must outweigh "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Id.* at 150. Third, Plaintiff's protected speech must have been a substantial factor in the Defendants' termination decision. *See Mt. Healthy City Sch. Dist. Bd. Of Educ. v Doyle*, 429 U.S. 274, 287 (1977).

In determining whether an employee's speech addressed "a matter of public concern" the Court must consider the content, form, and context of the speech in question. *See Connick*, 461 U.S. at 147-48; *see also Arvinger v. Mayor and City Council of Baltimore*, 862 F.2d 75, 79 (4th Cir. 1998) (although content of speech is the "central aspect" of the Court's determination, form and context may also be important factors.) This determination is a question of law for the Court. *See Connick*, 461 U.S. at 148 n.7. Here, it is indisputable that the content of Plaintiff's speech - a complaint regarding alleged racial and sexual discrimination against students at a state-run academy - was a matter of political, social, or other concern to the community." *See id.*, 461 U.S. at 146.

In examining the form and context of speech, courts have focused on whether a public employee has spoken merely as an employee with a personal grievance, or as a disinterested citizen concerned about a matter of potential interest to the public. *See Connick*, 461 U.S. at 148-49. Although Plaintiff's alleged complaints of discrimination were made in private discussions with two of her supervisors, the private nature of Plaintiff's alleged complaints does not disqualify them from being "matters of public concern," see *Givhan v. Western Line Consol. Sch. Dst.*, 439 U.S. 410, 413-14 (1979).

In addition, it is true that the policy Plaintiff allegedly criticized was one affecting her students but having no direct bearing on her own position. The fuller context of Plaintiff's complaints may reveal the private nature of her concerns, however. Plaintiff was being disciplined during the months of April and May, and it is far from clear that her complaints predated these disciplinary measures, the first of which was received on April 3. It is not unlikely, given these dates, that Plaintiff first raised the issue of discriminatory dismissal once her own job performance was already at issue. Having students from her class dismissed may have reflected unfavorably on her own job performance, and therefore

Plaintiff had a personal interest in finding other reasons for their dismissal. In that case, Plaintiff's real, private concern about her position at the Academy would belie her apparent concern about a matter of public interest. Furthermore, it is unclear whether Plaintiff raised the issue of discrimination on the occasions throughout April in which she approached her supervisors to complain about a student's dismissal. She does not say whether at those meetings she objected on grounds of discrimination, or whether she merely objected to being excluded from these decisions.

The facts presented appear to resemble those in *Connick v. Myers*, which involved an assistant district attorney who passed around a questionnaire in her office, seemingly concerned with office policies and pressure on employees to work for political campaigns. *Connick*, 461 U.S. at 141. The Court in *Connick* found that most of the questionnaire did not address a matter of public concern, as the plaintiff was actually motivated by the desire to gather ammunition to use in an ongoing conflict with her supervisors. *Id.* at 148. Similarly, on the facts presented here, this court cannot say with surety that Plaintiff raised the issue of race and sex discrimination as a citizen speaking out on a matter of public concern, rather than as an employee voicing a private grievance.

In light of this court's determination that Plaintiff's statements were not clearly addressing a matter of public concern, this court need not examine the second and third elements necessary to prove a case of First Amendment retaliation. Defendants' alleged actions do not violate clearly established law, and therefore qualified immunity bars Plaintiff's suit against Defendants in their individual capacities.

4. Plaintiff's Pendent State Law Claims

Having dismissed the federal basis of Plaintiff's claims, the Court must now decide whether to exercise its

discretion and retain jurisdiction over their supplemental, state-law claims. *See* 28 U.S.C. § 1367 (1998). The Fourth Circuit, interpreting section 1367, has explained that "trial courts enjoy wide latitude in determining whether or not to retain jurisdiction over state law claims when all federal claims have been extinguished." *Shanaghan v. Chaill*, 58 F.3d 106, 110 (4th Cir. 1995). In this case, the Court, acting within its discretion, will decline to retain jurisdiction over Plaintiff's state law claims.

CONCLUSION

For the reasons stated above, Defendants' Motion for Summary Judgment will be **GRANTED**, and Plaintiffs' Complaint dismissed in its entirety.

SO ORDERED.

This 6th day of October, 1999.

\s\

TERRENCE W. BOYLE
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

KIMBERLY F. GODON, Plaintiff,	)
v.	)
NORTH CAROLINA CRIME CONTROL & PUBLIC SAFETY; NORTH CAROLINA TARHEEL CHALLENGE ACADEMY; KENNETH STALLS (in his individual and official capacities); DALE AUTRY (in his individual and official capacities); and THE STATE OF NORTH CAROLINA, Defendants.	)

JUDGMENT
No. 5:96-CV-804-BO(1)

Entered: October 7, 1999

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED, ADJUDGED AND DECREED Defendants' Motion for Summary Judgment will be GRANTED, and Plaintiff's Complaint dismissed in its entirety. (Boyle, J.)

THIS JUDGMENT FILED AND ENTERED ON OCTOBER 7, 1999 AND COPIES TO:

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October 7, 1999

DAVID W. DANIEL, CLERK

\s\ _____
David W. Daniel
(by) Deputy Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1458

KIMBERLY F. GODON,

Plaintiff-Appellant,

v.

NORTH CAROLINA CRIME CONTROL & PUBLIC SAFETY; NORTH CAROLINA TARHEEL CHALLENGE ACADEMY; KENNETH STALLS, in his individual and official capacities; DALE AUTREY, in his individual and official capacities; LESLIE T. EVERETT, in his individual and official capacities; STATE OF NORTH CAROLINA,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Terrence W. Boyle, Chief District Judge.
(CA-96-804-5-BO)

Argued: March 4, 1998
Decided: April 23, 1998
Entered: April 23, 1998

Before WILKINSON, Chief Judge, NIEMEYER, Circuit Judge, and CLARKE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part, reversed in part, and remanded by unpublished per curiam opinion.

COUNSEL

ARGUED: Marvin Schiller, Raleigh, North Carolina, for Appellant. Isaac T. Avery, III, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees. **ON BRIEF:** Reuben F. Young, Assistant Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Kimberly F. Godon sued the Tarheel Challenge Academy and other defendants alleging that her discharge from the Academy violated her constitutional rights, Title VII, and North Carolina law. The district court dismissed Godon's federal claims, declined to exercise jurisdiction over her state claims, and denied Godon leave to amend her complaint. We affirm in part, reverse in part, and remand the case to the district court.

I.

Godon appeals a decision granting defendants' motion to dismiss, so we accept as true the facts alleged in the complaint. *McNair v. Lend Lease Trucks, Inc.*, 95 F.3d

325, 327 (4th Cir. 1996) (en banc). The Tarheel Challenge Academy, a division of the North Carolina Department of Crime Control and Public Safety, provides teaching and training in a boot camp environment to former high school dropouts, known as cadets. Cadets, whose ages range between sixteen and nineteen, attend the Academy in order to receive a general equivalency diploma. As a team leader employed by the Academy, Godon supervised the training of the cadets.

In April 1995, Godon complained to Kenneth Stalls, Assistant Director of the Academy, and Dale Autrey, Assistant Commandant, about their discriminatory treatment of black and female cadets. Godon protested that Stalls and Autrey were terminating black and female cadets without cause while permitting white male cadets to remain at the Academy even when they had committed offenses warranting termination. Godon was fired from the Academy on approximately May 17, 1995.

Godon filed suit against Stalls, Autrey, Leslie Everett (Director of the Academy), the Academy, the Department of Crime Control and Public Safety, and the State of North Carolina. Godon claimed that she was discharged in retaliation for her complaints in violation of the United States Constitution, Title VII, and North Carolina law. She sought compensatory and punitive damages, reinstatement to her former position, and other relief. The district court dismissed Godon's federal claims, declined to exercise supplemental jurisdiction over her state claims, and denied Godon's motion for leave to amend her complaint. Godon now appeals the dismissal of her federal claims and the denial of leave to amend her complaint.

II.

We first turn to Godon's claim that her discharge violated her First Amendment rights. The district court held that Godon's complaint failed to state a claim because her

speech did not address a matter of public concern but merely expressed her personal dissatisfaction with defendants' disciplinary practices. We conclude that the complaint, though vague, states a claim under the First Amendment; we must therefore reverse the district court's dismissal of this claim.

To state a claim for retaliatory discharge under the First Amendment, a plaintiff must satisfy a three-part test. First, the employee must be speaking "as a citizen upon matters of public concern" and not "as an employee upon matters only of personal interest." *Connick v. Myers*, 461 U.S. 138, 147 (1983); *accord DiMeglio v. Haines*, 45 F.3d 790, 805 (4th Cir. 1995). Second, the employee's interest in speaking upon the matter must outweigh "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150; *accord Stroman v. Colleton County Sch. Dist.*, 981 F.2d 152, 156 (4th Cir. 1993). Finally, the employee's speech must have been a substantial factor in the employer's termination decision. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Hanton v. Gilbert*, 36 F.3d 4, 7 (4th Cir. 1994).

Both the Supreme Court and this circuit have observed that an employee's complaints of discrimination can be speech on a matter of public concern. *See Connick*, 461 U.S. at 146; *Cromer v. Brown*, 88 F.3d 1315, 1326 (4th Cir. 1996). Godon's complaint alleges that she spoke with both Stalls and Autrey "about their discriminatory treatment of female and black cadets" at the Academy. Compl. ¶ 14. Specifically, she protested that they were "discriminatorily and disproportionately terminating female and black cadets without cause while permitting white male cadets to remain enrolled in the program even when they committed infractions sufficiently severe for them to be terminated from the program." *Id.*

The district court looked beyond the content of Godon's criticisms and found that they did not address a

matter of public concern because of the form and context in which Godon made them. We agree that, in addition to content, the form and context of an employee's speech are important factors in determining whether it is entitled to First Amendment protection. *Connick*, 461 U.S. at 147-48; *Hall v. Marion Sch. Dist. No. 2*, 31 F.3d 183, 192 (4th Cir. 1994). However, those factors are of limited utility at this stage because Godon's complaint offers only scant details about the form and context of her criticisms. The complaint merely alleges that Godon raised her concerns with Stalls and Autrey. That Godon chose to raise them with her employer rather than the public does not automatically deprive her speech of all constitutional protection. *Givhan v. Western Line Consol. Sch. Dis.*, 439 U.S. 410, 415-16 (1979). Thus, we cannot conclude that Godon's complaints of discrimination, though raised internally, could never address a matter of public concern.

Defendants contend that, even if Godon's speech may have addressed a matter of public concern, it is apparent from the complaint that their interest in the effective provision of services at the Academy outweighs Godon's interest in speaking. Specifically, they claim that Godon's criticisms threatened to disrupt the Academy's boot camp environment that depended on a high degree of discipline and the absence of dissent.

Defendants' argument may ultimately prove persuasive, but it cannot prevail at this very early stage. "A government employer, no less than a private employer, is entitled to insist upon obedience to the legitimate, day-to-day decisions of the office without fear of reprisal in the form of lawsuits from disgruntled subordinates who believe that they know better than their supervisors how to manage office affairs." *DiMeglio*, 45 F.3d at 806. And the employer does not have "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick*, 461 U.S. at 152 (footnote omitted). The complaint, however,

does not reveal the manner, time, place or context in which the present disagreement arose. *See id.* at 153 (finding the manner, time, place, and context of the statements relevant to the balancing test). As a result, we cannot yet ascertain whether and to what extent Godon's protests were actually or potentially disruptive of the Academy's mission.[1]

Finally, Godon's complaint sufficiently alleges that her speech was a substantial factor in her discharge. The complaint avers that the reasons given in Godon's discharge letter "were false and a pretext for Defendants' retaliation for Plaintiff's aforesaid statements." Compl. ¶ 15. It further maintains that Godon "was discharged from her employment . . . as a consequence of the exercise of her freedom of speech under the 1st and 14th Amendments to the United States Constitution." *Id.* ¶ 18. In sum, Godon's complaint states a claim of retaliation in violation of her First Amendment rights.[2]

In holding only that Godon's complaint survives a motion to dismiss under Rule 12(b)(6), we offer no opinion

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[1] For similar reasons, at this stage we also cannot entertain the individual defendants' claims of qualified immunity. Defendants contend, and we agree, that qualified immunity often will shield parties from liability for First Amendment retaliation claims "because the relevant inquiry requires a `particularized balancing' that is subtle, difficult to apply, and not yet well-defined." *DiMeglio*, 45 F.3d at 806 (citations omitted); *accord Cromer*, 88 F.3d at 1330 n.11. Absent a more complete record, however, we cannot apply that balancing test and determine whether a reasonable official would have known that firing Godon violated a clearly established constitutional right. Once that record is developed, the district court may determine the immunity question.

[2] In the district court Godon sought to amend her complaint primarily to add allegations about Everett's involvement in her discharge. The district court denied her leave to amend her complaint on the ground that amendment would be futile and would not affect the court's legal analysis. We generally defer to district court decisions about whether leave to amend should be granted. *National Bank of Wash. v. Pearson*, 863 F.2d 322, 327 (4th Cir. 1988). In light of our disposition of Godon's First Amendment claim, we believe the district court should reconsider whether to allow Godon to amend her complaint.

on whether the claim will ultimately prove to be meritorious or on whether it should proceed to trial. On remand and after discovery, the district court must determine whether issues of triable fact exist on the elements of plaintiff's claim.

III.

We next consider Godon's Title VII claims. Godon contends that her complaint states claims of retaliatory discharge and sex discrimination in violation of Title VII. The district court held that no factual allegations in the complaint supported these claims. We agree that Godon's complaint fails to state a violation of Title VII and therefore affirm the district court's dismissal of these claims.

We first turn to Godon's retaliation claim. In relevant part, Title VII prohibits employers from discriminating against employees because they have "opposed any practice made an unlawful employment practice." 42 U.S.C. § 2000e-3(a). To state a prima facie case of retaliation, an employee must show that (1) she engaged in protected activity; (2) the employer took an adverse employment action against her; and (3) a causal connection exists between the protected activity and the adverse action. *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir. 1996); *McNairn v. Sullivan*, 929 F.2d 974, 980 (4th Cir. 1991). Godon's complaint, however, nowhere alleges that she opposed an *employment* practice at the Academy. Rather, it states merely that she disagreed with certain *disciplinary* practices, namely the expulsion of cadets. Godon's protests, therefore, do not constitute a protected activity within the meaning of Title VII. Her complaint thus fails to state a Title VII retaliation claim. Nor does her complaint state a claim of sex discrimination. To do so, an employee must show that the employer discriminated with respect to the "compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42

U.S.C. § 2000e-2(a)(1). Godon's complaint does not aver that anyone at the Academy discriminated against Godon, nor does it mention any facts that might give rise to any inference of discrimination. *See Karpel v. Inova Health Sys. Servs.*, 134 F.3d 1222, 1227-28 (4th Cir. 1998). Moreover the allegations supporting Godon's free speech claim -- that she was discharged *because of her complaints* -- undercut any argument that she was discharged *because of her sex*. In sum, Godon's complaint does not support -- and indeed undermines -- her claim that her employer discriminated against her because of her sex. Accordingly, the district court properly dismissed this claim.

IV.

In summary, we reverse the district court's dismissal of Godon's First Amendment claim. We affirm its dismissal of the Title VII claims. The case is remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

KIMBERLY F. GODON,	)
Plaintiff,	)
	)
v.	)
	)
NORTH CAROLINA CRIME CONTROL & PUBLIC SAFETY; NORTH CAROLINA TARHEEL CHALLENGE ACADEMY; KENNETH STALLS (in his individual and official capacities); DALE AUTRY (in his individual and official capacities); and THE STATE OF NORTH CAROLINA,	)
Defendants.	)

ORDER

No. 5:96-CV-804-BO(1)

Entered: March 6, 1997

This matter comes before the Court on Defendants' motions to dismiss, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and Plaintiff's motion for leave to file an amended complaint. For the reasons discussed below, Defendants' motions to dismiss are granted, and Plaintiff's motion is denied.

I. Statement of the Case

The relevant factual allegations in the complaint, accepted as true for the sake of argument only, are as follows:

Tarheel Challenge Academy (hereinafter, "the Academy"), a division of the North Carolina Department of Crime Control and Public Safety, provides education and

training to high school "dropouts" between the ages of sixteen and nineteen, otherwise known as "cadets," for the purpose of "enabling them to receive a GED (high school equivalent diploma) and proper discipline in a 'boot camp' environment."

On August 26, 1994, Kimberly Godon (hereinafter, "Plaintiff"), was hired by the Academy to work as a Team Leader. Plaintiff's responsibility was to supervise the training of the cadets.

During the month of April, 1995, Plaintiff alleges that she complained to Ken Stalls, Assistant Director of the Academy, and Dale Autry, Assistant Commandant of the Academy, "about their discriminatory treatment of female and black cadets at [the Academy] by their discriminatorily and disproportionately terminating female and black cadets without cause while permitting white male cadets to remain enrolled in the program even when they committed infractions sufficiently severe for them to be terminated from the program."

Plaintiff was fired on May 17, 1995, and Plaintiff claims that the reason she was terminated was because she had complained about the discriminatory treatment of black and female cadets. Plaintiff claims that the Academy's "purported reasons for discharging Plaintiff," unspecified in the complaint, "were false and a pretext for Defendants' retaliation for Plaintiff's aforesaid statements."

Having satisfied all administrative prerequisites, Plaintiff brought this action on September 16, 1996, alleging a violation of her free speech rights protected by the First Amendment to the United States Constitution, a violation of her free speech rights protected by the North Carolina Constitution, sexual discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, ("Title VII"), wrongful discharge under the common law of the State of North Carolina, and breach of contract. Plaintiff seeks reinstatement to her former position of employment, compensatory and punitive damages,

attorney's fees and costs, a trial by jury, and any other relief which the Court may deem just and proper.

II. Discussion

A. Defendants' Motions to Dismiss

1. Claim for Relief Under §§ 1983 and 1985[1]

The allegations in the complaint, which must be accepted as true when considering a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), establish the following: the North Carolina Department of Crime Control and Public Safety, a public institution, fired Plaintiff, a public employee, for no other reason than that she complained to her supervisors at the state-run Academy that black and female cadets were being discriminated against on the basis of their race and sex.

According to Plaintiff, she is entitled to damages and reinstatement under 42 U.S.C. §§ 1983 and 1985, since it is well-established that a public institution "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers,* 461 U.S. 138, 142, 103 S.Ct. 1684, 1687, 75 L.Ed.2d 708 (1983) (cites omitted); *Pickering v. Board of*

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[1] In her response to Defendants' motions to dismiss, Plaintiff clarified that her claim for *monetary damages* under 42 U.S.C. §§ 1983 and 1985 is only against *the three individual defendants in their individual capacities.* (*See* Plaintiff's Response, p. 2). Since Plaintiff's claim for prospective injunctive relief--reinstatement to her former position of employment--is not tantamount to a claim for monetary damages, Plaintiff's claim for injunctive relief against *the individual defendants in their official capacities* is *not,* as Defendants argue, barred by the Eleventh Amendment. *See, e.g., Cromer v. Brown,* 88 F.3d 1315, 1332 (4th Cir.1996) ("[T]o the extent [Plaintiff] sought injunctive relief (e.g., reinstatement) against Sheriff Brown in his official capacity, the district court should not have granted summary judgment to Sheriff Brown. Eleventh Amendment immunity does not protect state officials in their official capacities from § 1983 claims for injunctive relief") (citing *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71 n. 10, 109 S.Ct. 2304, 2312 n. 10, 105 L.Ed.2d 45 (1989)).

Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

According to the defendants, while it is true that a public employee cannot be fired for exercising a constitutionally protected right, Plaintiff did *not* have a right, under the First Amendment, to complain to her supervisors about the manner in which they treated their students. Alternatively, Defendants argue that even if Plaintiff did have a right to complain, the defendants certainly had a reasonable belief that she did not, and are therefore entitled to qualified immunity as a matter of law.

a. Was Plaintiff's Speech Constitutionally Protected?

In determining whether or not a public employee's speech was constitutionally protected, the threshold question is whether the employee, at the time of the speech in question, was speaking "as a citizen on a matter of 'public concern,' " *Cromer v. Brown,* 88 F.3d 1315, 1325 (4th Cir.1996) (quoting *Connick, supra,* 461 U.S. at 146, 103 S.Ct. at 1689-90). If the employee was speaking "upon matters only of personal interest," then the speech was not protected by the First Amendment. *Hall v. Marion School Dist. No. 2,* 31 F.3d 183, 192 (4th Cir.1994) (cite omitted).

In determining whether or not an employee's speech addressed a matter of "public concern," which is a question of law, *Connick,* 461 U.S. at 147-48, n. 7, 103 S.Ct. at 1690, n. 7, the Court must consider the ' "content, form, and context' " of [the speech in question]." *Cromer, supra,* at 1325 (quoting *Connick,* 461 U.S. at 147-48, 103 S.Ct. at 1690). In *Arvinger v. Mayor and City Council of Baltimore,* the Fourth Circuit noted that "[a]lthough the *Connick* court did not elaborate on the relative weight to be accorded these three factors, this Court has held that 'content ... is always the central aspect.' " *Arvinger v. Mayor and City Council of Baltimore,* 862 F.2d 75, 79 (4th Cir.1988) (quoting *Jackson v. Bair,* 851 F.2d 714, 720 (4th Cir.1988)).

Here, it is indisputable that the *content* of Plaintiff's speech, a complaint concerning racial and sexual discrimination against students at a state-run academy, was "a matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146, 103 S.Ct. at 1690, and not the purely selfish gripe of a disgruntled employee.

But the inquiry does not end here. Although it may be true that content is the "central aspect" in determining whether speech concerns a matter of public concern, it is not the only aspect, and *form* and *context* are relevant considerations that can not be ignored. In this case, the form and context of Plaintiff's speech--a private, verbal grievance to her supervisors--suggest that Plaintiff was not criticizing her supervisors in an effort to expose their inappropriate behavior, or to spark a debate on a matter of public import, and, in the opinion of this Court, this severely undermines Plaintiff's claim that she is entitled to *Pickering* protection. As the Fourth Circuit noted in *Arvinger*,

> The *Pickering* doctrine is not aimed at protecting the jobs of public employees in the face of any statement they might make on any subject. Instead, because debate on topics of public concern is fundamental to the American system of government at all levels, *Pickering* is designed to ensure that a governmental entity does not use its personnel decisions to influence that debate. *Statements that do not contribute to that debate, are, consequently, afforded less protection against such governmental personnel decisions.* First Amendment protection is invoked most often by a public employee when the employee attempts to contribute to the debate on his or her governmental employer by criticizing that employer.

Arvinger, at 78 (emphasis added).

In *Pickering,* the plaintiff, a teacher in a public school, was fired by the Board of Education "for sending a letter to a local newspaper ... that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools." *Pickering,* 391 U.S. at 564, 88 S.Ct. at 1732-33. The plaintiff in *Pickering* was attempting to expose the school board's mishandling of an issue of public concern, and the school board's dismissal of Plaintiff was a clear attempt to ***stifle debate*** on an issue of public concern.

In *Connick v. Myers, supra,* the Supreme Court made it clear that the purpose of the *Pickering* doctrine is not to protect an employee's ***right to complain*** about matters of public concern, but, rather, to protect an employee's ***right to further public debate*** on an issue of public importance. The speech at issue in *Connick* was a questionnaire that an assistant district attorney distributed to her fellow employees, and the Court held that most of the questions on the questionnaire, which concerned "office transfer policy, office morale, the need for a grievance committee, [and] the level of confidence in supervisors," *Id.,* 461 U.S. at 141, 103 S.Ct. at 1687, did *not* address matters of public concern, since "[Plaintiff] did not seek to inform the public that the District Attorney's Office was not discharging its governmental responsibilities ..." *Id.,* 461 U.S. at 148, 103 S.Ct. at 1690-91. Unlike the plaintiff in *Pickering,* the plaintiff in *Connick* was not attempting to spark a public debate about the effectiveness of the District Attorney's performance, and thus the District Attorney's decision to fire Plaintiff because of the questionnaire could not be interpreted as an effort to stifle debate about an issue of public import. As the Eleventh Circuit noted in *Kurtz v. Vickrey,* 855 F.2d 723, 729 (11th Cir.1988), "[A Plaintiff's] profession of public concern loses force when it is considered that he took no affirmative steps to remedy, or to inform the public at large about, the problems with which he was so gravely concerned."

This Court recognizes that "[p]ublic employees do not forfeit the protection of the Constitution's Free Speech Clause merely because they decide to express their views privately rather than publicly." *Cromer, supra,* at 1326 (citing *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 413- 14, 99 S.Ct. 693, 695-96, 58 L.Ed.2d 619 (1979)).

But there is a difference between a private communication that is clearly intended to spark a debate on a matter of public concern, and a private communication that is nothing more than a personal expression of dissatisfaction about the employer's behavior. In *Cromer,* for instance, the speech at issue was a letter sent to a Sheriff by 32 of his black deputies, collectively known as the Black Law Enforcement Officers Association, complaining about the Sheriff's discriminatory treatment of black employees. The Sheriff believed that the plaintiff, who had recently been demoted, was responsible for the letter, and the Sheriff allegedly fired Plaintiff for no other reason. The Fourth Circuit held that even though the letter to the Sheriff was privately communicated, it involved a matter of public concern, and the Court's rationale was as follows:

> the Sheriff considered the letter a group effort by black officers, and indeed it was. Virtually all of the black officers in the department participated in the Association. They discussed the items covered in the letter at four meetings, and they sent the letter as a body to voice their concerns about what they considered discrimination. Thus, the letter was not the expression of a single disgruntled employee about a personal employment dispute.

Cromer, at 1326 (cite omitted).

The Fourth Circuit's decision in *Cromer* was consistent with its earlier decision in *Hall v. Marion School Dist. No. 2,* 31 F.3d 183 (4th Cir.1994), in which the Court noted that a public school teacher's written complaints to the principal of her school "about numerous problems she had with the school system and administration" was not sufficiently *public* to merit constitutional protection. ***"Although ... [Plaintiff's] internal memoranda may have been a private matter,*** it is clear that her letters to the editor, FOIA requests, and questionnaire [which Plaintiff sent to the local newspaper] involved a public employee speaking as a citizen upon issues of public concern." *Id.,* at 193 (emphasis added) (cite omitted).

If it is true, as the Fourth Circuit seemed to suggest, that the "internal memoranda" in *Hall*--copies of which were sent to Plaintiff's attorney, the State Superintendent of Education, a U.S. Congressman, and then-President Bush, *See Hall,* at 188--were nothing more than private expressions of personal dissatisfaction about school policy, then it is not clear why this Court should view the speech at issue in the instant case any differently. Here, Plaintiff merely alleges that she approached her supervisors and verbally expressed personal dissatisfaction concerning the discriminatory manner in which the Academy was treating its students. Plaintiff does not allege that she put her complaints in writing and then sent them to the local newspaper, or that she approached her supervisors on behalf of a group of other Team Leaders at the Academy who were similarly dissatisfied with the treatment of black and female students. Nor does Plaintiff claim that she threatened to go public with her complaints if the supervisors did not investigate her allegations. Plaintiff alleges nothing more than that "during the month of April, 1995," she complained to her supervisors about the treatment of black and female students, and then in mid-May she was fired for no other reason than having complained. While it is true, as this Court noted above, that the content of Plaintiff's speech concerned a matter of public

import, the manner in which Plaintiff chose to communicate her concerns to her supervisors was certainly not calculated to spark a public debate about the discriminatory treatment of black and female students at the Academy, or to expose wrongdoing on the part of her supervisors, and thus the defendants' decision to fire Plaintiff was simply the suppression of an employee's *personal expression of dissatisfaction,* and not a suppression of *public debate* that the *Pickering* doctrine is intended to prevent.

For the foregoing reasons, this Court finds that Plaintiff's speech was not sufficiently related to a matter of public concern to merit *Pickering* protection, and thus Defendants' motion to dismiss the First Claim for Relief is granted.

2. Claim For Relief Under Title VII

Plaintiff's Third Claim for Relief alleges "Title VII Sex Discrimination and Retaliation." The problem with this claim is that there are no factual allegations in the complaint to support it. Plaintiff does not allege that she suffered any adverse employment action because of her sex, nor does Plaintiff allege that she was discriminated against for having opposed ***an employment practice made unlawful by Title VII.*** *See* 42 U.S.C. § 2000e-3.

Since Plaintiff has failed to state a claim for relief under Title VII, Plaintiff's Third Claim for Relief is dismissed.

3. Plaintiff's State Law Claims

Plaintiff alleges three claims for relief based on state law: the Second Claim for Relief in the complaint alleges a violation of the North Carolina Constitution's free speech clause, Article 1, Section 14; the Fourth Claim for Relief in the Complaint alleges wrongful discharge under the common

law of State of North Carolina; and the Fifth Claim for Relief alleges breach of contract.

In view of the dismissal of all federal claims for relief, this Court, acting within its discretion, declines to hear Plaintiff's supplemental state law claims. Therefore, the original complaint is dismissed in its entirety.

B. Plaintiff's Motion for Leave to File Amended Complaint

Since the additional factual allegations in the proposed amended complaint would not affect this Court's analysis of Plaintiff's legal claims, Plaintiff's motion for leave to amend her complaint is denied.

III. Conclusion

For the foregoing reasons, Defendants' motions to dismiss are granted, and Plaintiff's motion for leave to file an amended complaint is denied. Accordingly, this action is dismissed in its entirety.

SO ORDERED.

This 4th day of March, 1997.

\s\

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

KIMBERLY F. GODON,
Plaintiff,

v.

NORTH CAROLINA CRIME CONTROL)
& PUBLIC SAFETY, NORTH CAROLINA)
TARHEEL CHALLENGE ACADEMY,)
KENNETH STALLS (in his individual)
and official capacities), DALE AUTRY)
(in his individual and official capacities),)
and THE STATE OF NORTH CAROLINA,)
Defendants.

JUDGMENT IN A CIVIL CASE
No. 5:96-CV-804-BO(1)

Entered: March 6, 1997

Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff Kimberly F. Godon recover nothing of defendants North Carolina Crime Control & Public Safety, North Carolina Tarheel Challenge Academy, Kenneth Stalls (in his individual and official capacities), Dale Autry (in his individual and official capacities),Leslie T. Everett (in his individual and official capacities), and The State of North Carolina and this case is **DISMISSED**.

THIS JUDGMENT WAS FILED AND ENTERED THIS THE 6TH DAY OF MARCH, 1997 AND COPIES MAILED TO:

Marvin Schiller
Two Hannover Sq., Suite 1250
Raleigh, N. C. 27601

Isaac T. Avery, III
Reuben F. Young
P. O. Box 629
Raleigh, N. C. 27602-0629

March 6, 1997

DAVID W. DANIEL, Clerk

\s\ _____
David W. Daniel
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-2509
Ca-96-804-5-BO

KIMBERLY F. GODON,

Plaintiff-Appellant,

v.

NORTH CAROLINA CRIME CONTROL & PUBLIC SAFETY; NORTH CAROLINA TARHEEL CHALLENGE ACADEMY; KENNETH STALLS, in his individual and official capacities; DALE AUTREY, in his individual and official capacities; LESLIE T. EVERETT, in his individual and official capacities; STATE OF NORTH CAROLINA,

Defendants-Appellees.

On Petition for Rehearing and Rehearing En Banc

Entered December 29, 2000

The appellant's petition for rehearing and rehearing en banc as submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS SO ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

\s\ _____
Patricia S. Connor
CLERK

(2)

Supreme Court, U.S.
FILED
JUN 22 2001
CLERK

No. 00-1561

In the
Supreme Court of the United States

KIMBERLY F. GODON

Petitioner,

v.

NORTH CAROLINA CRIME CONTROL & PUBLIC SAFETY; NORTH CAROLINA TARHEEL CHALLENGE ACADEMY; KENNETH STALLS, in his individual and official capacities; DALE AUTRY, in his individual and official capacities; LESLIE T. EVERETT, in his individual and official capacities; STATE OF NORTH CAROLINA,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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June 22, 2001

**Counsel of Record*

QUESTIONS PRESENTED

I. WHETHER, UNDER THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EQUITABLE REMEDY OF REINSTATEMENT IS AVAILABLE TO A FORMER STATE EMPLOYEE WHO WAS EMPLOYED UNDER A TIME-LIMITED CONTRACT WHICH HAS NOW EXPIRED AND WHO CLAIMS HER CONTRACT WAS TERMINATED AS A RESULT OF A LEGITIMATE EXERCISE OF HER FIRST AMENDMENT RIGHTS?

II. WHETHER A PLAINTIFF WHO DEFEATS A DEFENDANT'S MOTIONS PURSUANT RULES 12(B)(6) AND 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE IS ENTITLED TO A TRIAL?

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No. 00-1561

In the
Supreme Court of the United States

KIMBERLY F. GODON

Petitioner,

v.

NORTH CAROLINA CRIME CONTROL & PUBLIC SAFETY; NORTH CAROLINA TARHEEL CHALLENGE ACADEMY; KENNETH STALLS, in his individual and official capacities; DALE AUTRY, in his individual and official capacities; LESLIE T. EVERETT, in his individual and official capacities; STATE OF NORTH CAROLINA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Tarheel Challenge Academy ("the Academy") is a quasi-military style program for youths sixteen (16) to eighteen (18) years of age who are high school dropouts and expellees, and is sponsored by the North Carolina National Guard which is a division of the Department of Crime Control and Public Safety ("CC&PS"). The program consists of two phases: a

twenty-two (22) week in-residence phase and a post-resident phase of twelve (12) months. During the in-resident phase, cadets attend school, eat, sleep, wear uniforms, and learn to work within a highly structured and disciplined program. The purpose of the Academy is to enable the cadets to receive a GED (high school equivalent diploma) and to develop the necessary skills to succeed after the cadet completes the program. The cadets are subject to a rigorous behavior code and any infractions are documented and if sufficiently serious or persistent can result in expulsion from the program. The cadre, or cadet supervisors, are also expected to conform to a high standard of behavior and to set a good example for the cadets as set forth in the Cadre Standard Operating Procedure.

The management structure of the Academy consisted of respondent Leslie T. Everett, the Director, respondent Kenneth Stalls, the Deputy Director, and respondent Dale Autry, the Assistant Commandant.

On August 26, 1994, petitioner entered into a written one-year contract with CC&PS to perform the function of Team Leader at the Academy. App. at 3a-6a. The agreement set forth petitioner's responsibilities as a Team Leader which included supervising the training of a platoon consisting of twenty-five (25) cadets. App. at 1a-3a. The agreement also provided that "if, through any cause, the CONTRACTOR shall fail to fulfill in a timely and proper manner the obligations under this Agreement," that the contract could be terminated by the agency upon a one-day written notice. App. at 4a.

From August until the spring of 1995, petitioner's job performance was satisfactory. However, during April and May of 1995, petitioner rapidly began accumulating negative performance evaluations which prompted several counseling sessions with petitioner. On May 17, 1995, Director Everett

gave petitioner written notice of her contract termination based on the following specific grounds:

> a) By your own admission to Mr. Autry on May 9, 1995, you acknowledged you had given permission for female cadets to sleep together in single/one person beds for "safety and security reasons." You also acknowledged that Mr. Boone, the Commandant of cadets, had specifically told you such a practice was not allowed.
>
> b) You received a verbal counseling on April 28 and a written on May 5, 1995 regarding certain aspects of your performance of duty (Team Leader) in which you were placed on probation for the remainder of your contract. On May 6, 1995, you told the cadets that you had been counseled and placed on probation. Later that day, Mr. Autry was presented a copy of a petition signed by approximately 60 personnel, (mainly cadets) asking that we (the Academy) keep you here as Team Leader for Team 1.

App. at 7a.

Petitioner filed the present action on September 16, 1996 claiming that the true reason for her discharge was that she had complained to Stalls and Autry about their discriminatory and disproportionate termination without cause of the facility's female and black cadets while they permitted white male cadets to remain enrolled in the program although their infractions were sufficiently severe to result in termination.

In its Order entered October 7, 1999, the District Court dismissed the individually named defendants in their official capacity stating: "Although under the doctrine of Ex parte Young, 209 U.S. 123, 159-60 (1908), prospective injunctive relief is available in a claim against state officers in their official capacities, the reinstatement Plaintiff seeks is not prospective, and thus Plaintiff's official capacity claim is barred by the Eleventh Amendment." Pet. App. at 10. On appeal, the Fourth Circuit Court of Appeals affirmed the dismissal of the individually named defendants in their official capacity stating: "For the reasons given by the district court, we affirm its dismissal of the State defendants and the individual defendants in their official capacity." Pet. App. at 5.

SUMMARY OF THE ARGUMENT

The narrow issue presented for the Court's consideration by this Petition for Writ of Certiorari is whether, under the Eleventh Amendment to the United States Constitution, the equitable remedy of reinstatement is available to a former state employee who was employed under a time-limited contract which has now expired and who claims her contract was terminated as a result of a legitimate exercise of her First Amendment rights. Petitioner, Kimberly F. Godon, asserts that the Fourth Circuit Court of Appeals erroneously affirmed the dismissal of the individually named defendants in their official capacity in that reinstatement, which she denominates "prospective injunctive relief," is a remedy which is not barred by the Eleventh Amendment under Ex parte Young. Petitioner seeks a Writ of Certiorari on the ground that the Fourth Circuit's decision affirming the dismissal of the individually named defendants in their official capacity is in conflict with decisions of this Court, other Fourth Circuit decisions and decisions of other Circuit Courts of Appeal.

Respondents contend that this Court should deny the Petition for Certiorari because the dismissal of the individually named defendants in their official capacity was correct since a state employee, employed under a time-limited contract which has expired, is not entitled to reinstatement as a species of prospective injunctive relief under this Court's Eleventh Amendment jurisprudence.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF THE SUPREME COURT, THE FOURTH CIRCUIT'S OWN PRIOR DECISIONS OR DECISIONS OF OTHER FEDERAL COURTS OF APPEAL BECAUSE A FORMER STATE EMPLOYEE WHO WAS EMPLOYED UNDER A TIME-LIMITED CONTRACT WHICH HAS EXPIRED IS NOT ENTITLED TO REINSTATEMENT AS PROSPECTIVE INJUNCTIVE RELIEF.

A. First Amendment

The respondents acknowledge that "[i]t is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." Rankin v McPherson, 483 U.S. 378, 383 (1987) (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)). See Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 283-84 (1977); Pickering v. Board of Education, 391 U.S. 563, 568 (1968). In addition, this Court further stated in Rankin: "Even though McPherson was merely a probationary employee, and even if she could have been discharged for any reason or for no reason at all, she may nonetheless be entitled

to reinstatement if she was discharged for exercising her constitutional right to freedom of expression." 483 U.S. at 383-84. However, it is important to note that Ardith McPherson was employed as a deputy in the office of the Constable of Harris County, Texas. Id. at 380. Marvin L. Pickering was employed as a teacher in Township High School District 205, Will County, Illinois. Pickering, 391 U.S. at 564. Fred Doyle was employed by the Mt. Healthy Board of Education which was a local school board. Mt. Healthy, 429 U.S. at 280. However, because the Eleventh Amendment does not protect cities or counties, Will v. Michigan Dep't of State Police, 491 U.S. 58, 70 (1989), none of the foregoing cases implicate Eleventh Amendment immunity applicable to **state** employees' First Amendment suits. Although Robert Sindermann was employed as a teacher in the state college system of the State of Texas, the Sindermann case was essentially decided on whether Sindermann was entitled to demonstrate that he possessed a protected property interest in his employment sufficient to require procedural due process in the form of a hearing "where he could be informed of the grounds for his nonretention and challenge their sufficiency." 408 U.S. at 603.

Our research does not reveal any case where this Court has directly addressed the issue of whether the Eleventh Amendment permits injunctive relief in the form of reinstatement against a **state** employer found to have wrongfully discharged a **state** employee in violation of the employee's constitutional rights.

B. Eleventh Amendment Sovereign Immunity

The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by

Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

> This language expressly encompasses only suits brought against a State by citizens of another State, but this Court long ago held that the Amendment bars suits against a State by citizens of that same State as well. See Hans v. Louisiana, 134 U.S. 1 (1890), 10 S. Ct. 504, 33 L. Ed.2d 842. "[In] the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 100, 104 S. Ct., at 907-909 (1984). This bar exists whether the relief sought is legal or equitable. Id., at 100-101.

Papasan v. Allain, 478 U.S. 265, 276 (1986) (footnote omitted).

Sovereign immunity not only encompasses states qua states and state entities, but includes government officials as well. As this Court explained:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. See, e.g., Scheuer v. Rhodes, 416 U.S. 232, 237-238, 94 S. Ct. 1683, 1686-87, 40 L. Ed. 2d 90 (1974). Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690, n.55, 98 S. Ct. 2018, 2035 n.55, 56 L. Ed. 2d 611 (1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity

> suit is, in all respects other than name, to be treated as a suit against the entity. Brandon, supra, 469 U.S., at 471-472, 105 S. Ct., at 878.

Kentucky v. Graham, 473 U.S. 159, 165-66 (1985).

C. Ex parte Young and Prospective Injunctive Relief

A narrow exception to Eleventh Amendment immunity has long been recognized by this Court which applies to individuals named as defendants in their official capacity.

> The landmark case of Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed.2d 714 (1908), created an exception to this general principle by asserting that a suit challenging the constitutionality of a state official's action in enforcing state law is not one against the State. Id., at 159-160, 28 S. Ct., at 453-54. The theory of Young was that an unconstitutional statute is void, id., at 159, 28 S. Ct., at 453-54 and therefore does not "impart to [the official] any immunity from responsibility to the supreme authority of the United States." Id., at 160, 28 S. Ct., at 454. Young also held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent **a continuing violation of federal law**. Id., at 155-156, 159, 28 S. Ct., at 452-53. We have refused to extend the reasoning of Young, however, to claims for retrospective relief.

Green v. Mansour, 474 U.S. 64, 68 (1985) (emphasis added) (citations omitted). As this Court explained more recently:

> The doctrine of Ex parte Young, which ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law, is regarded as carving out a necessary exception to Eleventh Amendment immunity. See, e. g., Green v. Mansour, 474 U.S. 64, 68, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985). Moreover, the exception is narrow: It applies only to prospective relief, does not permit judgments against state officers declaring that they violated federal law in the past, id. at 73, 106 S. Ct., at 428, and has no application in suits against the States and their agencies, which are barred regardless of the relief sought, Cory v. White, supra. Rather than defining the nature of Eleventh Amendment immunity, Young and its progeny render the Amendment wholly inapplicable to a certain class of suits. Such suits are deemed to be against officials and not the States or their agencies, which retain their immunity against all suits in federal court.

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993). See also Will, 491 U.S. at 71 n.10 (1989) ("[O]fficial-capacity actions for prospective relief are not treated as actions against the State."); Edelman v. Jordan, 415 U.S. 651, 664 (1974) ("[T]he relief awarded in Ex parte Young was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment.").

D. Requirements For Applying Ex parte Young

In Papasan, this Court addressed the issue raised in this Petition; namely, the circumstances under which an individual

defendant acting in his/her official capacity can be subject to a mandatory injunction.

> In accordance with its original rationale, Young applies only where the **underlying authorization** upon which the named official acts is asserted to be illegal. See Cory v. White, 457 U.S. 85, 102 S. Ct. 2325, 72 L. Ed. 2d 694 (1982) . . .
>
> . . . Consequently, Young has been focused on cases in which a violation of federal law by a state official is **ongoing** as opposed to cases in which a violation of federal law has been violated at one time or over a period of time in the past, as well as on cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interest such as compensation. As we have noted: "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." Green v. Mansour, 474 U.S. 64, 68, 106 S. Ct. 423, 426, 88 L. Ed. 2d 371 (1985) (citation omitted).

Papasan, 478 U.S. at 277-78 (emphasis added).

The requirement that a violation be ongoing is in accord with traditional equitable principles which require that an "equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there

is no showing of any real or immediate threat that the plaintiff will be wronged again — a 'likelihood of substantial and immediate irreparable injury.'" City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (internal citation omitted) (no injunction would issue to enjoin future use of illegal chokeholds by the police).

E. Circuit Courts of Appeal Decisions

Defendants acknowledge that several Circuit Courts of Appeal, including the Fourth Circuit, have held that reinstatement is a form of prospective injunctive relief. See cases cited at page 6, Petition. See also Doe v. Lawrence Livermore Nat. Laboratory, 131 F.3d 836, 839-42 (9th Cir. 1997) (discussing rationale of reinstatement of physicist as prospective injunctive relief), rev'd on other grounds sub nom. Regents of the University of California v. Doe, 519 U.S. 425 (1997); Treleven v. University of Minnesota, 73 F.3d 816, 819 (8th Cir. 1996) (Eleventh Amendment did not bar state employed faculty member's reinstatement); Cross v. State of Alabama, 49 F.3d 1490, 1503 (11th Cir. 1995) (Eleventh Amendment did not bar reinstatement of state mental health worker); Dube v. State University of New York, 900 F.2d 587, 595 (1990) (reinstatement of state university professor); Russell v. Dunston, 896 F.2d 664, 668 (2nd Cir. 1990) (state retiree's reinstatement to medical leave not barred by Eleventh Amendment). Virtually all of these cases authorizing reinstatement as prospective injunctive relief do so with little or no analysis related to the requirements set forth in Papasan. Instead, they rely on the fact that reinstatement does not affect the public fisc in the sense of awarding back pay or damages and thus fall within the Ex parte Young exception. See Edelman, 415 U.S. at 677 ("[A] federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a

retroactive award which requires the payment of funds from the state treasury. . . ."). Notably, none of the foregoing Circuit Court cases, or the cases cited by petitioner, involve a time-limited contract such as the one applicable in this case.

F. Fourth Circuit Court of Appeals Decisions

The Fourth Circuit has likewise held that, **under appropriate circumstances**, reinstatement constitutes prospective injunctive relief. In Cromer v. Brown, 88 F.3d 1315 (4th Cir. 1996), an African American sheriff's deputy sued his former employer, the sheriff of Greenville County, South Carolina, for racial discrimination and First Amendment violations. Id. at 1318. The Fourth Circuit affirmed the district court's holding that the sheriff, as a state official, was immune from suit for money damages and reversed the district court's determination that the doctrine of official immunity protected the sheriff from claims for injunctive relief stating:

> [T]o the extent Cromer sought injunctive relief (e.g., reinstatement) against Sheriff Brown in his official capacity, the district court should not have granted summary judgment to Sheriff Brown. Eleventh Amendment immunity does not protect state officials in their official capacities from § 1983 claims for injunctive relief. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 n.10, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989).[1] Therefore, we reverse the district court's dismissal of Cromer's §

---

[1] Cromer incorrectly relied on Will v. Michigan Dep't of State Police which was an appeal from a state court determination of whether the state official in his official capacity is a "person" within the meaning of 42 U.S.C. § 1983. The Eleventh Amendment does not apply in state court. 491 U.S. at 63-64.

> 1983 claims against Sheriff Brown in his official capacity insofar as they request injunctive relief.

Cromer, 88 F.3d at 1332.

In Coakley v. Welch, 877 F.2d 304 (4th Cir. 1989), the court affirmed the district court's refusal to dismiss several officials of the South Carolina State Ports Authority ("SPA") from a suit brought by a terminated SPA employee. The court stated:

> Coakley granted to the district court that a decision barring his damages action against the SPA on eleventh amendment grounds would equally bar a damages action against Welch. The decision as to damages having favored Welch, the only question for us is whether the court ought also to have held Welch immune from Coakley's claim for the injunctive remedy of reinstatement. We believe the district court was correct to permit Coakley to pursue injunctive relief.
>
> Papasan v. Allain, 478 U.S. 265, 106 S. Ct. 2932, 92 L. Ed. 2d 209, (1986), and McConnell v. Adams, 829 F.2d 319 (4th Cir. 1987), cert. denied, [486] U.S. [1006], 108 S. Ct. 1731, 100 L. Ed. 2d 195(1988), supply authority on this issue. Papasan indicates that Coakley has alleged a claim that falls within the purview of the Young exception. All that this requires is an assertion that "the underlying authorization upon which the named official acts is . . . illegal." Id. at 277, 106 S. Ct. 2940. The SPA regulations containing the hearing requirement that Coakley believes flouts due process supply an underlying authorization.

Papasan held, though, that "the balance of federal and state interests that [Young] embodies" recommends applying the Young exception only to cases alleging ongoing violations of federal law. Id. Papasan offered as a final observation on the matter that the difference between suits barred and litigable "will not in many instances be that between day and night." Id. 478 U.S. at 278, 106 S. Ct. at 2940 (quoting Edelman v. Jordan, 415 U.S. 651, 667, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974)). The narrow issue with which we must grapple, then, is the shadowy one of whether Welch has alleged an "ongoing violation" of law.

Papasan was an equal protection suit brought by a number of Mississippi municipal school officials and school children against various officials of the State of Mississippi. The suit alleged that a history of poor treatment by the State, amounting to a breach of trust, had resulted in severe financial disadvantages to the plaintiffs' school districts.

The Court found the defendants subject to suit under the eleventh amendment, holding that the "alleged ongoing constitutional violation -- the unequal distribution by the State of the benefits of the State's school lands -- is precisely the type of continuing violation for which a remedy may permissibly be fashioned under Young." 478 U.S. at 282, 106 S. Ct. at 2942. The Court found the essence of the complaint to be the present, and presumably ongoing, disparity in educational opportunity, and not the past actions of the State that had created the disparity. Id.

Coakley, 877 F.2d at 306.

McConnell v. Adams, 829 F.2d 1319 (4th Cir.1987), involved a political patronage violation of the First and Fourteenth Amendments. In affirming the district court, the Fourth Circuit stated:

> The appellants' actions in failing to rehire the appellees violated the appellees' rights guaranteed by the first and fourteenth amendments. The decision of the district court finding such a violation is accordingly affirmed. Since the state's eleventh amendment immunity does not protect it from suits for injunctive relief governing its officials' future conduct, the order of the district court requiring the appellants to rehire the appellees is also affirmed. Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

McConnell, 829 F.2d at 1329-30.

In another recent Fourth Circuit Court of Appeals decision, the court discussed the nature of prospective injunctive relief and discussed prior decisions of this Court.

> Both [Papasan and Milliken[2]] involve classic examples of presently experienced harmful consequences of past conduct, hence of ongoing violations of federally protected constitutional rights. As the district court put it, the state-official defendants in Milliken "were in violation of federal law at the precise moment when the case was filed."

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[2] Milliken v. Bradley, 433 U.S. 267 (1977).

The Republic of Paraguay v. Allen, 134 F.3d 622, 628 (1998) (citation omitted). In discussing its own prior decisions, the court stated:

> For the same reason, Paraguay's reliance on this court's decisions in Coakley v. Welch, 877 F.2d 304 (4th Cir. 1989), and Thomas S. by Brooks v. Flaherty, 902 F.2d 250 (4th Cir. 1990), is misplaced. Coakley held that a state employee unconstitutionally discharged from his employment suffers a "continuing violation" of that property right that could be remedied by a federal injunctive decree requiring his reinstatement. Thomas S. held that persons subjected to unconstitutional treatment when formerly in state mental institutions suffered continuing violations of those constitutional rights after their release that could be remedied by a federal injunctive decree for their care. Again, those cases concerned classic claims of ongoing violations of federally-protected property and liberty rights. As in Milliken and Papasan, at the time that those actions were filed, responsible state officials were presently violating the claimants' ongoing rights.

Paraguay, 134 F.3d at 628.

It is clear that the Fourth Circuit adheres to the majority view that reinstatement - **in an appropriate case** - is a valid form of prospective injunctive relief. The Circuit Courts of Appeal have extended Ex parte Young from enjoining an ongoing constitutional violation to enjoining an ongoing harm resulting from prior constitutional violations, assuming such an extension is the law. It is equally clear that the case at bar is not such a case.

G. Application of the Law to the Case At Bar

1. No Underlying Authorization

In this case, petitioner does not and cannot point to any **underlying authorization** upon which the individually named defendants based their allegedly impermissible conduct in terminating petitioner for her exercise of constitutionally protected speech. If, in fact, their conduct was wrongful, it certainly was not grounded in any policy or procedure officially endorsed by the Tarheel Challenge Academy or any of the other named state defendants. It was a single decision involving a single employee.

2. No Ongoing Wrong

The conduct complained of is not **ongoing**. There are two aspects to the concept of "ongoing." First, the entire rationale of the Young exception to Eleventh Amendment immunity is grounded in the notion that, pursuant to the Supremacy Clause, state officials may be enjoined from **continuing** to violate federal law. "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." Green, 474 U.S. at 68 (citations omitted).[3] Petitioners's claim is that the individually

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[3] Edelman acknowledged that the Eleventh Amendment did not bar an injunction requiring the state to comply with federal standards for processing welfare applications in the future. 415 U.S. at 664. Papasan held that the equal protection claim that Mississippi's disparity in school land grant funding was not barred by the Eleventh Amendment where the essence of the equal protection allegation was the present disparity in the distribution of the benefits of state-held assets, and not the past actions of the state. 478 U.S. at 282. In Green, this Court affirmed the denial of a declaratory judgment that state officials violated federal law in the past when there was no ongoing violation of federal law. 474 U.S.

named respondents violated her First Amendment rights in the past. Petitioner cannot show any likelihood that respondents will violate her rights in the future anymore than the plaintiff in Lyons could show that he was in jeopardy of being subjected to future illegal chokeholds. See also Mumford v. Basinski, 105 F.3d 264, 270 (6th Cir. 1997) ("[A] claim for retrospective relief for past violation(s) of federal law . . . are not exempted from the Eleventh Amendment's jurisdictional bar.").

3. Damages Are An Adequate Remedy.

A second rationale typically utilized in employment cases is that due to the wrongful discharge, the state employee suffers an "ongoing" harm by being deprived of the benefits of employment in which he/she has a constitutionally protected property interest. Even if this rationale met the requirements of Papasan, it is inapplicable in this case. Petitioner did not have any permanent or "ongoing" employment relationship with the Tarheel Challenge Academy. She had a one-year renewable contract. Petitioner was discharged on May 17, 1995. Her contract terminated on August 31, 1995. Petitioner's property interest is clearly limited by the terms of her one-year contract which expired on August 31, 1995. App. at 2a. Pearce v. Employment Sec. Comm'n of North Carolina, 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998) ("Under North Carolina law, an employee has a protected 'property' interest in continued employment only if the employee can show a legitimate claim to continued employment under a contract, a state statute or a local ordinance."). An injunction cannot restore petitioner to the status quo ante because the contract term has expired. Such an order would be the functional equivalent of a breach of contract action which implicates the sovereignty of the state.

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at 73 ("There is no claimed continuing violation of federal law, and therefore no occasion to issue an injunction.").

See Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 281 (1997) (ongoing violation of property rights is the functional equivalent of a quiet title action); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 74 (1996) (detailed remedial scheme for enforcement forecloses Ex parte Young action). Such a remedy may not be available under a state breach of contract action. See Caudell v. Dellinger, 129 N.C. App. 649, 660, 501 S.E.2d 99, 106 (1998) (plaintiff not entitled to reinstatement because she had resigned and district attorney was entitled to hire an administrative assistant to "serve at his pleasure"), aff'd per curiam, 350 N.C. 89, 54 S.E.2d 304 (1999).

If she prevails, petitioner's remedy is money damages for the three and one-half months remaining on her contract at the time of her discharge. The availability of legal damages forecloses injunctive relief under traditional equitable principles. See Reuber v. United States, 750 F.2d 1039 (D.C. Cir. 1984) (discussing rationale for disallowing reinstatement as prospective injunctive relief).

The fact that reinstatement is not available pursuant to her section 1983 claim does not affect her state law claim for money damages for breach of contract. See Smith v. State of North Carolina, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976) ("[W]henever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract.") In addition, petitioner retains the potential to an award of damages from the individually named defendants in their individual capacity. Alden v. Maine, 527 U.S. 706, 757 (1999). Petitioner may not be entitled to reinstatement, but she is not without a remedy.

H. Mootness

Since the contract has long since expired, the issue of reinstatement is now moot. "'[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969)). "'The central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful review' of the issue presented." 13A Charles A. Wright, et al., Federal Practice and Procedure § 3533.3 at 261 (1984). A federal court may adjudicate a claim only if "an actual controversy [is] extant at all stages of review, not merely at the time the complaint is filed." Preiser v. Newkirk, 422 U.S. 395, 401 (1975), quoted in Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997). In Arizonans for Official English, this Court unanimously held that a state employee's change to private employment rendered moot a claim for prospective injunctive relief. 520 U.S. at 72. Petitioner's one-year contract has expired therefore her claim is moot and the individually named defendants in their official capacity were properly dismissed.

II. PETITIONER IS NOT ENTITLED TO A TRIAL IF, AFTER FURTHER DISCOVERY, THE DISTRICT COURT DISMISSES ALL FEDERAL CLAIMS.

Petitioner asserts that having twice defeated Respondents' dispositive motions to dismiss and for summary judgment, that she should be allowed to proceed to trial under Rule 56(d) of the Federal Rules of Civil Procedure because such a result would be "just." The Petitioner asks this Court to "unpack" the term "just" as it is used in Rule 56(d) as a matter of first impression. The respondents contend that the use of the term

"just" in Rule 56(d), under the facts of the case at bar, does not foreclose disposition of this case short of a trial on the merits.

Although this case has twice been reviewed by the Fourth Circuit Court of Appeals, protracted proceedings do not suspend the Rules of Civil Procedure. The Federal Rules of Civil Procedure are "as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule[s'] mandate than they do to disregard constitutional or statutory provisions." Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988). See also Chambers v. Nasco, Inc., 501 U.S. 32, 66 (1991) (Scalia, J., dissenting).

In its most recent opinion, the Fourth Circuit expressed concern that the factual record, consisting of affidavits, was insufficient to dispose of petitioner's claims on a motion for summary judgment. Pet. App. at 5. The Court remanded the case to the district court for further proceedings. Pet. App. at 5. The Court further noted that "the scant record and the parties' discussion at oral argument raise significant doubts about the ultimate viability of Godon's claims." Pet. App. at 5.

Further discovery may well develop facts sufficient to allow the district court to grant summary judgment on all issues in respondents' favor. Whether petitioner's federal claim(s) have twice been revived on appeal should not bear on the manner in which the case is ultimately determined.

CONCLUSION

For the reasons stated above, petitioner's claim for injunctive relief does not meet the criteria of prospectively remedying an ongoing wrong. Even so, the issue is moot. Therefore, the Fourth Circuit Court of Appeals did not err in affirming the dismissal of Defendants Stalls, Autry and Everett in their official capacities. In addition, there is no need for this Court to construe the term "just" as it is used in Rule 56(d) of the Federal Rules of Civil Procedure.

This Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROY COOPER
North Carolina Attorney General

Isaac T. Avery, III*
Special Deputy Attorney General

Patricia A. Duffy
Assistant Attorney General

June 22, 2001

* Counsel of Record

APPENDIX

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*STATE OF NORTH CAROLINA
CONTRACTOR NAME: K. Godon
COUNTY OF WAKE
BUDGET CODE: 14900
FUND SOURCE: 1218

AGREEMENT*

THIS AGREEMENT is hereby made between the State of North Carolina, Department of Crime Control and Public Safety, hereinafter referred to as "Agency and

GODON, KIMBERLY FERN, (Contractor Name)
1BBQCreekEstates/ Broadway, NC 27505, (Address)
(919) 499-4898 (Telephone) and 564-55-8489 (Taxpayer ID/SSN)

hereinafter referred to as the "CONTRACTOR";

WITNESSETH

That WHEREAS, the AGENCY desires to engage the CONTRACTOR to perform the professional services hereinafter described;

Therefore, the AGENCY and the CONTRACTOR do mutually agree as follows:

1. Contractual Status. The AGENCY and the CONTRACTOR agree that the CONTRACTOR shall perform

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* This original agreement was amended effective March 1, 1995 to increase petitioner's salary to $26,123. In all other respects the two agreements are identical.

the services required of the CONTRACTOR herein set forth; provided that the CONTRACTOR is not and will not by virtue of this contract acquire the status of an employee of the AGENCY.

2. Time and Place of Performance. The effective date of this agreement is 26 Aug 94 and the termination date is 31 Aug 95. The place of performance of this contract will be at a location as designated by the North Carolina National Guard, currently the Halls-Piney Grove School located in Clinton, Sampson County, North Carolina.

3. Compensation. The Agency agrees to pay the CONTRACTOR the annual sum of $23,859 and to pay the Agency's portion of social security taxes. The sum of those two figures shall represent complete and total compensation for the services to be rendered by the Contractor as set forth in paragraph four. In addition, however, all necessary and appropriate travel expenses and subsistence will be reimbursed at the current State rates, subject to the requirement that written approval must be obtained from the Director of the "Tarheel Challenge Program." In no event will there be reimbursement for commuting expenses.

4. Scope of Services to be Rendered. The CONTRACTOR hereby agrees to perform in a manner satisfactory to the AGENCY services in support of the North Carolina National Guard's "Tarheel Challenge Program" and shall serve in the capacity of Team Leader with the following description of services to be rendered by CONTRACTOR: The person in this position receives direction and guidance from the Commandant of Cadets. The purpose of this position is to provide daily supervision to Academy cadets in the residential portion of the program; Provide 24 hour, 7 days a week supervision for Academy cadets; assist instructors, Counselors and others in

cadet development activities; Conduct inspections of cadets, cadet quarters, cadet activates and activity areas; Provide for accountability, control and safety of cadets; Supervise training site preparation and training operations; Assist with awards and graduation ceremonies; Assist with in-processing and out-processing of cadets; Provide limited fire line counseling and assistance to cadets until appropriate staff are present; Transport and supervise cadets when participating in off-site Academy activities; Participate in and supervise cadet physical training activities; Provide instruction assistance when required and qualified; Coordinate with and assist other Squad Leaders in providing for cadet development and supervision; Perform all other duties as assigned. Additionally, Contractor agrees to comply with all applicable federal and state regulations relating to the Challenge Program, to include, but not limited to, submission to urinalysis and blood screening/testing.

5. Invoice. Payment under this AGREEMENT will be made monthly upon full compliance with this contract and upon receipt of an original invoice from the CONTRACTOR setting forth a time sheet and work/services performed and showing the amount due and payable pursuant to Paragraphs 3 and 4 of this AGREEMENT. All services must be performed to the satisfaction of the AGENCY prior to any payment being made.

6. Contract Administrator. Leslie T. Everett, Jr., Director of the Tarheel Challenge Program, is designated as the contract administrator for this AGREEMENT. The contract administrator is responsible for monitoring the CONTRACTOR'S performance, approving payment to the CONTRACTOR and for providing evaluation of the CONTRACTOR.

7. Funding. All terms and conditions of this AGREEMENT are dependent upon and subject to the allocation of funds for

the purposes set forth and the AGREEMENT shall automatically terminate if funds cease to be available.

8. Taxes. The CONTRACTOR shall be considered to be an independent contractor and as such shall not be entitled to any benefits and shall be responsible for all taxes except as set forth in paragraph three above. The CONTRACTOR authorizes the Agency to withhold for state and federal income taxes, social security taxes, Medicare taxes and any other amount due and payable under this agreement as provided by the provisions of the Internal Revenue Code, Title 26, United States Code. Contractor agrees to reimburse the Agency, or its assigns, for any penalty due to Contractor's failure to make any tax payments.

9. Warranty. As an independent contractor, the CONTRACTOR will hold the AGENCY harmless for any liability and personal injury that may occur from or in connection with the performance of the AGREEMENT. Any and all insurance coverage of Contractor, including liability coverage, shall be the sole responsibility of Contractor.

10. Termination of Agreement. If, through any cause, the CONTRACTOR shall fail to fulfill in a timely and proper manner the obligations under this Agreement, the AGENCY shall thereupon have the right to terminate this Agreement by giving written notice to the CONTRACTOR of such termination specifying the effective date thereof, at least (1) day before the effective date of termination. Upon termination pursuant to this paragraph, the CONTRACTOR shall be liable for any costs or expenses the AGENCY may incur in obtaining the completion of the services described in paragraph four hereof.

11. Situs. This contract shall be governed by the laws of North Carolina and any claim for breach or enforcement of the AGREEMENT shall be filed in State court in Wake County, North Carolina.

12. Antitrust Laws. This contract is entered into in compliance with all State and Federal antitrust laws.

13. Compliance with Law. The CONTRACTOR shall remain an independent contractor and as such shall be wholly responsible for the work to be performed under the supervision of his employees. The CONTRACTOR shall be responsible for compliance with all laws, ordinances, codes, rules, regulations, licensing requirements and other regulatory matters that are applicable to the conduct of the CONTRACTOR's business and work performance under this AGREEMENT, including those of Federal, State and local agencies having appropriate jurisdiction.

14. Assignment. This AGREEMENT or any interest herein shall not be assigned or transferred by the CONTRACTOR. The CONTRACTOR shall not subcontract any work to be performed pursuant to this AGREEMENT without the written approval of the AGENCY.

15. Advertisement. This AGREEMENT shall not be used for advertising by the CONTRACTOR without prior written approval of the Purchase and Contract Division of the Department of Administration.

16. Entire Agreement. This AGREEMENT, including any exhibits and amendments annexed hereto and any documents incorporated specifically by reference, represents the entire agreement between the parties and supersedes all prior oral and written statements; or agreements. This AGREEMENT may

be amended only by written amendments duly executed by the AGENCY and the CONTRACTOR.

17. This agreement does not become binding until approved by all required governmental agencies and executed by all parties.

IN WITNESS WHEREOF, the AGENCY and the CONTRACTOR have each executed this AGREEMENT, this the 25 day of August, 1994.

ATTEST:
By: \s\ Stephanie L. Scott

NORTH CAROLINA DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY:

By:\s\ Thurman B. Hampton
Thurman B. Hampton,
Secretary

ATTEST:
By:\s\ Jimmy T. Crawford

By: \s\ Kimberly Godon
CONTRACTOR

APPROVED AS TO AVAILABILITY OF FUNDS:
By: \s\ Jack W. Reavis
Jack Reavis, Controller

APPROVED AS TO FORM SUBJECT TO EXECUTION BY THURMAN B. HAMPTON, SECRETARY OF CRIME CONTROL AND PUBLIC SAFETY.

MICHAEL F. EASLEY
ATTORNEY GENERAL OF NORTH CAROLINA
BY: \s\ Linda M. Fox
Assistant Attorney General

(Original letter on letterhead)
ChalleNGe
7780 Hobbton Hwy
Clinton, NC 28328
1-800-573-9966

May 17, 1995

Ms. Kim Godon
1 BBQ Creek Estates
Broadway, NC 27505

SUBJECT: Notice of Termination of Contract

This is to notify you of the termination of your contract with the Tarheel ChalleNGe Academy, effective May 21, 1995.

This termination is based on the following:

a) By your own admission to Mr. Autry on May 9, 1995, you acknowledged you had given permission for female cadets to sleep together in single/one person beds for "safety and security reasons". You also acknowledged that Mr. Boone, the Commandant of cadets, had specifically told you such a practice was not allowed.

b) You received a verbal counseling on April 28 and a written on May 5, 1995 regarding certain aspects of your performance of duty (Team Leader) in which you were placed on probation for the remainder of your contract. On May 6, 1995, you told the cadets that you had been counseled and placed on probation. Later that day, Mr. Autry was presented a copy of a petition signed by approximately 60 personnel, (mainly cadets) asking that we (the Academy) keep you here as Team Leader for Team 1.

It is inconceivable to me you would take either of the two actions listed above. Not only was the first action prohibited (females sleeping together), it gives two erroneous perceptions: first, that the Academy supported your concurrence of females sleeping together and secondly, that we have a "safety and security" problem here.

Your second action is seen as a deliberate attempt to involve cadets in what is purely a management/supervisor matter. Our cadets have enough demands and stress without being solicited to take sides in a situation in which they have absolutely no reason to be involved in.

I regret the necessity to terminate your contract. Your contract termination is deemed to be in the best interest of the Tarheel ChalleNGe Academy program.

Questions may be addressed to the undersigned or in my absence to Mr. Stalls.

\s\
Leslie T. Everett
Director
Tarheel ChalleNGe Academy